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Case Number 388,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY EDELMAN, Plaintiff-Below/Appellant, v. JOHN BRYAN KING, BIANCA A. RHODES, RONALD J. KNUTSON, LKCM HEADWATER INVESTMENTS II, L.P., LKCM HEADWATER II SIDECAR PARTNERSHIP, L.P., HEADWATER LAWSON INVESTORS, LLC, LKCM MICRO-CAP PARTNERSHIP, L.P., LKCM CORE DISCIPLINE, L.P., and LUTHER KING CAPITAL MANAGEMENT CORPORATION, Defendants-Below/Appellees, -and- DISTRIBUTION SOLUTIONS GROUP, INC., a Delaware corporation, Nominal Defendant-Below/Appellee.	)	No. 388, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0886-JTL **PUBLIC VERSION** **Filed: January 22, 2024**

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NATURE OF PROCEEDINGS

For nearly two years, Appellant has grasped for a theory to bring purported derivative claims on behalf of Distribution Solutions Group, Inc. ("DSG"), based on its concurrent acquisitions (the "Mergers") of two distribution companies, 301 HW Opus Holdings, Inc. ("Gexpro") and TestEquity Acquisition, LLC ("TestEquity"), that had been owned by affiliates of Luther King Capital Management Corporation ("LKCM"). At every turn the Court of Chancery rejected Appellant's scattershot contentions about supposed issues with the Special Committee's process for negotiating the Mergers and with the sufficiency of DSG's disclosures.

Now, challenging only the Court of Chancery's dismissal of some claims against some Defendants,[1] Appellant retreats to a single argument: that the minority stockholder vote supposedly was not fully informed under *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). In Appellant's view, DSG's Definitive Proxy Statement for the stockholder vote on the Mergers (the "Proxy") should have disclosed additional information about the financial advisor's preliminary analyses related to comparable companies. Appellant also contends that the Proxy should have disclosed that one director—who had nothing to do with the

[1] As used in this brief, the term "Defendants" refers to all Defendants-Below and the term "Appellees" refers to the Defendants-Below named in the notice of appeal.

independent Special Committee that negotiated the Mergers—allegedly was conflicted when she was one of five directors who voted at the Board level unanimously to follow the recommendation of the unquestionably disinterested and independent Special Committee to approve the Mergers. As with Appellant's previously discarded theories—which the Court of Chancery rejected after a trial on Appellant's Section 220 claims and on a motion to dismiss Appellant's purported derivative claims—Appellant's argument is baseless as a matter of law and should be rejected.

SUMMARY OF ARGUMENT

The Court of Chancery's dismissal should be affirmed in all respects.

1. As a threshold procedural matter, Appellant has waived or forfeited any opportunity to challenge the dismissal of the following Defendants: DSG CFO Ronald J. Knutson; DSG directors and Special Committee members Lee S. Hillman, Andrew B. Albert, and I. Steven Edelson; DSG directors Bianca A. Rhodes and Mark F. Moon; and John Bryan King in his capacity as a DSG director. Appellant's notice of appeal did not purport to challenge dismissal of the Special Commitee members or Moon. (Dkt. 1.) Although Appellant listed Rhodes and Knutson in the notice of appeal (*id.*), Appellant's brief does not offer any reason why the Court of Chancery erred in dismissing either of them and does not include Rhodes or Knutson in the definition of "Defendants" for purposes of the appeal. (Op. Br. 1 n.1.) Indeed, Appellant's brief does not mention Knutson at all (other than in the case caption), and refers to Rhodes only in the context of challenging the Court of Chancery's dismissal on *MFW* grounds, without challenging the dismissal of any claim against Rhodes herself. Furthermore, while Appellant also listed King in the notice of appeal, Appellant's brief does not reference any claim against King in his capacity as a director. Under this Court's well-established precedent, Appellant has therefore waived or abandoned any appeal against these Defendants.

2. As to Appellant's Summary of Argument Paragraph 1, ***denied***. For the reasons set forth below, the Court of Chancery correctly found that *MFW* foreclosed Appellant's claims.

3. As to Appellant's Summary of Argument Paragraph 2, ***denied***. The Court of Chancery correctly found that the stockholder vote was fully informed under *MFW*.

a. Here, as below, Appellant's principal argument is that the stockholder vote was not fully informed because, although the Proxy accurately disclosed the set of comparable companies that the financial advisor used in its Fairness Opinions, the Proxy supposedly *also* should have disclosed that the advisor had used different comparable companies in a preliminary draft analysis more than four months earlier. But well-established precedent holds that such bends in the road are immaterial to stockholders, and that a vote is informed when the Proxy discloses a fair summary of the financial advisor's fairness opinion. Appellant does not dispute that the Proxy provided such disclosures. And Appellant's theory that the changes were the product of nefarious intent is unsupported and unreasonable. As much as Appellant may wish that the Proxy included extraneous information about the

financial advisor's preliminary analyses, Delaware law does not require such disclosures.

b. As a fallback, Appellant argues that although the Proxy accurately disclosed that the Special Committee voted 3-0 to recommend the Mergers and the Board then voted 5-0 to approve the Mergers (with two directors recusing themselves from the vote), the Proxy *also* should have disclosed that Rhodes—who did not serve on the Special Committee and had no role in the Special Committee's process—was allegedly conflicted as an "Operating Partner" of Headwater, when she voted alongside four indisputably independent directors to accept the Special Committee's recommendation to approve the Mergers. Even assuming solely for purposes of this appeal that the Complaint sufficiently alleges Rhodes was an "Operating Partner," that information was immaterial to stockholders voting on the Mergers. Rhodes played no role in the Special Committee's process and had nothing to do with the Special Committee's unanimous recommendation to approve the Mergers. Although Rhodes was one of five directors who unanimously voted to approve the Mergers at the Board level, her vote was not necessary to that outcome. Given that Rhodes' vote itself

was irrelevant, whether the Proxy described her as an "Operating Partner" was immaterial to any reasonable stockholder considering how to vote.

4. Separately, alternative grounds exist to affirm the Court of Chancery's dismissal without addressing the sufficiency of the Proxy's disclosures: empowering a fully independent and disinterested Special Committee is alone sufficient to invoke the business judgment standard of review in controller transactions like this one, which does not involve a squeeze-out. Appellant has never disputed that a fully independent and disinterested Special Committee negotiated and approved the Mergers, which this Court should hold sufficient to cleanse the alleged controller conflict.

STATEMENT OF FACTS[2]

A. DSG and Its Board.

DSG (formerly known as Lawson Products, Inc.) is a specialty distribution company providing high-touch, value-added solutions to the maintenance, repair, and operations market as well as the original equipment manufacturing and industrial technologies markets. (A00369.) Through the two strategic acquisitions underlying this case, DSG acquired two companies—Gexpro and TestEquity. (*Id.*; *see also* A00030, ¶ 24.)

When the Mergers were approved and closed, DSG's Board consisted of seven members: Defendants King, Hillman, Albert, Edelson, Rhodes, and Moon, and non-party Michael DeCata. (A00027–28, ¶¶ 13–19; A00305.) Appellant does not dispute that a majority of the members of the Board—including all three Special Committee members—were independent and disinterested with respect to the Mergers.

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[2] The record on appeal includes the Complaint and documents referenced in or integral to the Complaint, including DSG's Section 220 productions. (*See* A00180, ¶ 3 (ordering that documents produced in response to Appellant's Section 220 demand are deemed to be incorporated by reference in any complaint relating to the subject matter of the Section 220 demand); *City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource, Inc. v. Hamrock*, 2022 WL 2387653, at *2 & n.3 (Del. Ch. June 30, 2022) (recognizing similar stipulation).)

King is Chairman of the Board. (A00027, ¶ 13.) He is also a Principal in LKCM, an investment firm, as well as a Managing Partner of LKCM Headwater Investments ("Headwater"), LKCM's private-equity arm. (*Id.*; A00259.) Moon also held an interest in the Mergers through an equity interest in an affiliate of TestEquity. (A00027, ¶ 14.) LKCM and its affiliates have been investors in DSG for nearly a decade. Prior to the close of the Mergers, stockholders affiliated with LKCM beneficially owned 47.7% of DSG's common stock. (A00029, ¶ 21.)

B. The Special Committee Begins to Consider a Strategic Business Combination and Retains Cowen to Serve as Its Independent Financial Advisor.

The process leading up to the Mergers began on March 3, 2021, when Brad Wallace, Gexpro's Chairman and a Partner of Headwater (then majority owner of Gexpro), sent a letter to the Board on behalf of Gexpro and its affiliates expressing interest in discussing a potential business combination. (*See* A00036–37, ¶ 45.) On March 10, the Board resolved by unanimous written consent to establish the Special Committee to evaluate a potential transaction with Gexpro. (A00037, ¶ 46.)

The Special Committee comprised three undisputedly independent and disinterested directors: Albert, Edelson, and Hillman. (*Id.*) It was delegated full authority with respect to the consideration, evaluation, negotiation, and approval of any transaction with Gexpro, including the authority to (i) oversee and manage the

deal process; (ii) approve and recommend to the Board any such transaction; (iii) select, retain, and terminate legal counsel and financial and other advisors in its sole discretion; (iv) evaluate any related financing and applicable refinancing of the indebtedness of DSG or Gexpro; and (v) determine any other necessary or advisable action in furtherance of the potential transaction. (*Id.*; *see also* A00836–39.) Any transaction had to be approved by the Special Committee before it could be approved by the Board. (A00836–37.)

In April 2021, Hillman reached out to the CEO of Cowen and Company, LLC ("Cowen"), a nationally recognized investment banking firm, about a potential financial advisor engagement by the Special Committee. (A00843; *see also* A00037, ¶ 47.) After confirming it had no conflicts of interest (A00846), Cowen sent Hillman a presentation demonstrating its mergers-and-acquisitions experience, which noted over 100 merger transactions for which Cowen had provided financial advisor services in recent years and highlighted several examples, including in the industrial distribution business (A00849–76.) The Special Committee had a call with Cowen later that month, during which it explored the possibility of retaining Cowen as its financial advisor in connection with the proposed transaction. (A00038, ¶ 51.)

On May 16, 2021, King sent a letter on behalf of Headwater to Hillman, on behalf of the Special Committee, expressing interest in pursuing a combination of

DSG with two distribution companies owned by Headwater and its affiliates, with Headwater receiving shares of DSG common stock from DSG as consideration for DSG's acquiring the two companies. (A00039–40, ¶¶ 54–55; *see also* A00260; A00892–95.) Those companies were Gexpro and TestEquity. (A00039–40, ¶ 55.)

The Special Committee discussed Headwater's letter at a meeting on May 18, 2021. (A00041, ¶ 60.) The next day, the Board resolved by unanimous written consent to expand the scope of the Special Committee's authority to include a potential acquisition of TestEquity (in addition to Gexpro), with all the same power delegated under the March 10, 2021 unanimous written consent relating to Gexpro. (A00041–42, ¶ 61; *see also* A00898–900.)

On May 27, 2021, Headwater sent the Special Committee a second letter accompanied by a presentation discussing Gexpro's and TestEquity's businesses and finances and describing a proposed combination with DSG. (A00042, ¶ 62; *see also* A00902–34.) Referencing *MFW,* the letter stated as nonwaivable conditions of the proposal that any such combination would require (1) the approval of the Special Committee and (2) the affirmative vote of a majority of the total voting power of DSG's shares of common stock held by stockholders not affiliated with LKCM and present in person or by proxy at a stockholders meeting. (A00042, ¶ 62; *see also* A00261; A00902.)

The Special Committee began considering the proposed transactions following delivery of the materials. (A00261.) To that end, the Special Committee reviewed the proposed terms of its potential engagement of Cowen as its independent financial advisor with respect to the evaluation of the potential transactions and the scope of Cowen's anticipated services at a meeting on May 31, 2021. (A00043–44, ¶¶ 64–65.) In deciding to engage Cowen, the Special Committee considered Cowen's reputation, experience, and absence of conflicts. (A00261.)

The terms of Cowen's engagement provided that no part of its compensation depended on the outcome of the deal process: Cowen was paid 60% of its fee during the course of its engagement before the delivery of its fairness opinions, and the remaining 40% was payable upon delivery of its opinions, regardless of the outcomes of its opinions or the potential transactions. (A00292.) Appellant does not dispute that Cowen was independent and disinterested.

C. With the *MFW* Conditions in Place, the Special Committee Negotiated a Deal That Won Near Unanimous Support.

Over the next seven months, the Special Committee drove a vigorous process for considering whether, and on what terms, to recommend that DSG enter into the Mergers. The Special Committee convened over thirty times from June through December of 2021, on an almost weekly basis, to evaluate financial and other

diligence information, to receive and discuss reports from its advisors and DSG management, and to review the progress of negotiations, among other things. (*See* A00261–73; *see also* A00044–49, ¶¶ 67–76; A00057–63, ¶¶ 94–100.)

Representatives from Cowen attended each of the Special Committee's thirty-plus meetings. (*See, e.g.*, A00936–64.) Cowen led discussions about its financial due diligence and valuation activities during the majority of those meetings, and especially in the months of September through December. (*See, e.g.*, A00940–56.) Cowen also provided preliminary financial presentations to the Special Committee three times during its due diligence process: on August 11, 2021; August 17, 2021; and December 24, 2021. (A00264; A00271–73; *see also* A00964; A01577–1675; B001–72.[3])

[3] Cowen's December 24, 2021 presentations were not specifically cited by the parties in the plenary proceedings below, but they were a part of DSG's Section 220 productions, which were incorporated into the Complaint and thus are in the record. (*See* A00180, ¶ 3.)

Throughout the process, the Special Committee negotiated the amount of stock DSG would provide to acquire Gexpro and TestEquity. Following months of back-and-forth, on December 8, 2021, Headwater proposed an ownership allocation of 44.0% by legacy DSG stockholders, 37.1% by the Gexpro stockholder, and 18.9% by the TestEquity equityholder. (A000267–68.) These percentages were based on multiples of estimated 2021 EBITDA of 13.17x for DSG and Gexpro versus 12.00x for TestEquity, with TestEquity's estimated 2021 EBITDA including two acquisitions then under consideration by TestEquity. (A000268–69.)

Later on December 8, following negotiation with Hillman as representative of the Special Committee, Headwater revised its proposed ownership allocation by reducing the TestEquity equityholder's share of the combined company down to 15.8%. (A00269.) This figure was based on a 13.17x multiple of estimated 2021 EBITDA for all three companies, including TestEquity, but with an additional change that TestEquity's estimated 2021 EBITDA would now *exclude* the two acquisitions then under consideration by TestEquity. (*Id.*; *see also* A00048–49, ¶ 76.) Headwater's second proposal also included an earnout whereby TestEquity could earn additional shares by completing the contemplated acquisitions within one year of closing. (A00269.) The parties ultimately agreed on an earnout by which TestEquity had 90 days after closing to complete acquisitions and earn additional

shares. (A00313.) Furthermore, any such acquisition would need the approval of the Special Committee prior to entering into any definitive agreement. (A00312.)

On December 28, 2021, the Special Committee met with representatives from DSG management, Cowen, the Special Committee's legal counsel, and other advisors to discuss the final terms of the Mergers. (A00272.) During the meeting, Cowen reviewed its financial analyses with the Special Committee. (*Id.*) During the meeting, Cowen also delivered separate opinions concluding that the consideration to be paid by DSG in each of the Mergers—which consideration Cowen specified was "determined through negotiations between the Special Committee and TestEquity or Gexpro Services, as the case may be" (A00280)—was fair to DSG. (A00272; *see also* A00049, ¶ 77.)

Cowen's Fairness Opinions were based on various financial analyses, including a selected publicly traded companies analysis, a discounted cash flow analysis, a relative contributions analysis, a pro forma ownership analysis, and an illustrative give/gets analysis with respect to each company involved in the Mergers. (A00285–91.) Cowen also considered each company's latest management-prepared forecasts. (A00284.) With respect to its comparable companies analyses, Cowen noted specifically that the companies it selected were not "directly comparable" to DSG, Gexpro, or TestEquity, and disclosed that its analyses were "not purely

mathematical, but instead involve[d] complex considerations and judgments concerning differences in historical and projected financial and operating characteristics of the Selected Companies and other [relevant] factors." (A00286–88.)

Following this and other discussions, Special Committee members Hillman, Albert, and Edelson unanimously determined that the terms of the merger agreements were fair to and in the best interests of DSG and its stockholders (other than King, LKCM, and certain LKCM affiliates). (A00272.) The Special Committee voted to recommend that the Board approve, and that the Board recommend that stockholders approve, the merger agreements. (*Id.*)

Later on December 28, 2021, the Board met and voted 5-0 to approve the merger agreements and recommend them to DSG's stockholders, as the Special Committee had recommended. (A00272–73.) Directors Hillman, Albert, Edelson, DeCata, and Rhodes cast the five votes in favor of the Mergers. (*See id.*) King and Moon recused themselves from the vote due to their disclosed respective economic interests in the Mergers. (A00274, A00304.) The merger agreements were finalized and executed the following day. (A00273; *see also* A00050, ¶ 79.)

D. After DSG Disclosed All Material Information, the Wide Majority of Unaffiliated Shares Were Voted To Approve the Mergers.

DSG filed the Proxy, stretching 246 pages and attaching nearly 400 pages of additional materials, with the SEC on February 10, 2022. (Compl. ¶ 9; *see* A00183–826.) The Proxy disclosed all material information, including the background of the Mergers (A00259–74), and detailed summaries of Cowen's financial analyses and Fairness Opinions, which were also attached in full (A00280–91; *see also id.* at A00815–22.)

The Mergers closed on April 1, 2022, after approval by the affirmative vote of upwards of 89% of the total voting power of all shares held by DSG's stockholders not affiliated with LKCM. (A00966–77.) Over 99% of the total voting power of all shares held by stockholders unaffiliated with LKCM and present in person or by proxy at the stockholders meeting was voted in favor of the Mergers. (A00968–69.)

PROCEDURAL HISTORY

Before bringing this action, Appellant—along with the other Plaintiff-Below, Robert Garfield, who has since dropped his appeal—brought a books-and-records action pursuant to 8 *Del C.* § 220. (*See* A00020; A00179–81.) Consistent with Section 220, DSG produced all relevant formal board materials to Appellant. (*See* A01069.) At Appellant's request, DSG also produced certain additional informal material related to the Special Committee's retention of Cowen as financial advisor and Cowen's confirmation that it had no conflicts of interest. (*See* A00845–78.)

The Section 220 action proceeded to a trial before Vice Chancellor Laster. (*See* A00179–81; A00979–1077.) At trial, Appellant did not request additional documents related to Cowen's Fairness Opinions or to Rhodes' alleged conflict of interest. (*See* A00979–1077.) Appellant requested additional documents related to Cowen's retention by DSG, but the Court rejected that request. (*See* A00993–99, A01039–40, A01069–73.) Indeed, the Court rejected every one of Appellant's requests for additional documents except that the Court required DSG to produce a limited set of documents sufficient to show certain information related to guarantees of outstanding indebtedness, which are not relevant on appeal. (*See* A00179–80, ¶¶ 1–2; *cf.* A00051–56, ¶¶ 82–91 (discussing these documents).)

The Plaintiffs-Below filed this stockholder derivative action in the Court of Chancery on October 3, 2022. (*See* A00018, A00093.) They asserted claims based on various theories against Hillman, Edelson, Albert, Rhodes, King, Moon, and Knutson in their capacities as DSG directors or officers, as well as controller-based claims against King, LKCM, and certain LKCM affiliates. (A00084–91, ¶¶ 145–64.) Appellant pursues only the controller-based claims on appeal. (*See* Op. Br. 19–31.)

Defendants collectively moved to dismiss the Complaint under Rule 12(b)(6) and Rule 23.1. (*See* A00098–172, A01124–29.) The Court of Chancery held oral argument on the motions on September 13, 2023. (*See* A01756–1843.) Later that day, the Court entered an order dismissing the claims against the Special Committee members and Rhodes based on the exculpation clause in DSG's charter, holding that Appellant had not pleaded that these Defendants acted disloyally or in bad faith. (*See* A01840; B075.) The Court likewise dismissed the claims against Moon and King in his capacity as a director, holding that Appellant failed to plead facts "to suggest that they might have had some involvement" in the process. (*See* (A01840; A01846.) The Court denied Defendants' Rule 23.1 motion, reasoning that whatever Rhodes' alleged "Operating Partner" role meant, the allegation that she was an "Operating Partner" sufficed to render demand futile "at the pleading stage" because

it meant that the then six-member demand Board was allegedly not majority independent for demand futility purposes. (A01839; *see also* B075.) The Court reserved ruling on *MFW* for purposes of the remaining claims. (B075.)

The Court of Chancery delivered its *MFW* ruling telephonically six days later. (*See* Pl.'s Ex. A.) The Court held that "the *MFW* process was properly established and carried out, and the plaintiffs haven't stated a reasonably conceivable claim to challenge it." (*Id.* at 16:7–9; *see also id.* at 7:20–23 ("[I]t appears to me that both aspects of *MFW* were properly set up and that the plaintiffs haven't alleged facts raising a reasonably conceivable question about those issues.").)

Addressing the lead *MFW* argument advanced on appeal, the Court of Chancery explained that "[t]he plaintiffs allege . . . the disclosures that were provided to the minority stockholders were inadequate, hence *MFW* can't apply." (*Id.* at 11:5–8.) But the trial court rejected that argument, stating: "I reviewed the disclosures and considered the plaintiffs' claims, and to my mind, it's not reasonably conceivable that that could be the case." (*Id.* at 11:8–10.) Specifically discussing disclosures about Cowen's comparable companies analysis, the trial court stated:

> I want to note that the description of what happened with the change in EBITDA values is right there in the definitive proxy at pages 76 to 77. All the chronology is there. An explanation of the reasons is there. That's clearly one of the reasons why the plaintiffs were able to allege it. If any stockholders had concerns about that development, they could take them into account when voting. There are other disclosure issues, but they are quibbles.

(*Id.* at 12:6–18.) After rejecting Appellant's other theories for why *MFW* had not been satisfied, the trial court dismissed the Complaint with prejudice. (*See id.* at 17:7–21; Op. Br., Ex. B.)

On October 16, 2023, Appellant filed a notice of appeal, naming King, Rhodes, Knutson, and certain LKCM entities as the Defendants against whom the appeal was taken and attaching the Court of Chancery's final order. (*See* Dkt. 1; *id.*, Ex. C.) The notice of appeal did not name Hillman, Albert, Edelman, or Moon, or attach the separate orders dismissing the non-controller-based claims. (*See* Dkt. 1; *id.*, Ex. C.)

ARGUMENT

I. APPELLANT HAS WAIVED ANY APPEAL AS TO RHODES, KNUTSON, AND KING IN HIS CAPACITY AS A DIRECTOR.

1. Question Presented

Whether Appellant has waived any appeal as to Rhodes, Knutson, and King in his capacity as a director by failing to raise in Appellant's opening brief any argument with respect to the Court of Chancery's dismissal of the claims against them.

2. Scope of Review

This Court reviews issues of waiver on appeal in the first instance. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (holding that appellant waived arguments on appeal by failing to raise them in its opening brief).

3. Merits of Argument

Appellant's Complaint raised claims against each of the individual DSG Defendants: the three Special Committee members, Rhodes, Knutson, Moon, and King in his capacity as a director. (*See supra* p. 18.) The Court of Chancery dismissed these claims for failure to state any breach of fiduciary duty. (*See* Op. Br., Ex. B; B075.) Appellant did not notice any appeal as to the dismissal of the Special Committee members or Moon. (*See* Dkt. 1.) Thus, these Defendants are not parties

to this appeal and all claims against them have been dismissed with prejudice pursuant to the final judgment. *See* Sup. Ct. R. 7(c)(2).

Although Appellant named Rhodes and Knutson in the notice of appeal, the opening brief defines the "Defendants" on appeal to exclude both of them. (*See* Op. Br. 1 & n.1.) The opening brief does not reference the claims against either of them or challenge the dismissal of the claims against them.

Starting with Rhodes, Count I of the Complaint alleged breach of fiduciary duty against her and the other directors. (A00084–88, ¶¶ 145–52.) The Court of Chancery dismissed that claim based on the exculpation clause in DSG's charter and this Court's decision in *In re Cornerstone Therapeutics Inc. Stockholder Litigation* (B075), which held that to state a non-exculpated claim, a plaintiff must allege facts supporting a rational inference that a director "harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith." 115 A.3d 1173, 1179–80 (Del. 2015). The opening brief, however, says nothing about *Cornerstone*, Count I, or a claim against Rhodes. While the opening brief mentions Rhodes in the context of Appellant's *MFW* arguments, it is well-established that rebutting *MFW* alone does not state a claim against a non-controlling director. *See Cornerstone*, 115 A.3d at 1186. In fact, Appellant did not even attach the order

dismissing Rhodes to the notice of appeal (*see* Dkt. 1, Exs. A–C), suggesting she was never an Appellee to begin with. *See* Sup. Ct. R. 7(c)(2).

As for Knutson, Count II of the Complaint asserted a breach of fiduciary duty claim (A00088–90, ¶¶ 153–58), which the Court of Chancery dismissed in its September 19, 2023 final order (Op. Br., Ex. B). However, the opening brief does not mention Knutson outside the case caption and does not mention Count II at all. (*See generally* Op. Br.)

For his part, King was also dismissed in his capacity as a director along with Moon given their recusals from the Board-level vote on the Mergers and Appellant's failure to suggest "that they might have had some involvement" in the deal process. (*See* A01840–41; A01846.) While Appellant's opening brief includes King in the definition of "Defendants" on appeal (Op. Br. 1 & n.1), it makes no argument that the Court of Chancery erred in dismissing Appellant's claims against King in his capacity as a director, as opposed to the controller-based claim relating to *MFW*.

Under well-established precedent, Appellant's "failure to raise a legal issue in the text of the opening brief" as to Rhodes, Knutson or King in his capacity as a director "constitutes a waiver of [each] claim on appeal." *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); *see also Emerald P'rs*, 726 A.2d at 1224 ("Issues not briefed are deemed waived."); Sup. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that

is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

Accordingly, for this reason alone, this Court should either affirm the Court of Chancery's dismissal of Appellant's claims against Rhodes, Knutson, and King in his capacity as a director, or dismiss the appeal as to those Defendants, regardless of the *MFW* issues raised in Appellant's opening brief.

II. *MFW* FORECLOSES APPELLANT'S CLAIMS AGAINST THE REMAINING APPELLEES BECAUSE THE VOTE OF THE MINORITY WAS FULLY INFORMED.

A. Disclosure of the Change in Cowen's Comparable Companies Analysis for TestEquity Was Immaterial.

1. Question Presented

Whether Appellant failed to allege adequately that the vote of the minority was not fully informed, and *MFW* was thus inapplicable, where the Proxy disclosed that the Special Committee's financial advisor used certain publicly traded comparable companies in its Fairness Opinions but did not disclose that more than four months earlier, at the beginning of the due diligence process, the advisor had used different comparable companies in its preliminary analyses that were expressly subject to change?

2. Scope of Review

This Court reviews *de novo* the application of *MFW* on a motion to dismiss. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

3. Merits of Argument

Under this Court's decision in *MFW*, the business judgment rule is the standard of review for a controlling stockholder transaction—including at the pleading stage—where six conditions are satisfied:

> (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

MFW, 88 A.3d at 645. Appellant challenges just one of these conditions: whether the vote of the minority stockholders was fully informed.

In Appellant's view, it was not enough for the Proxy to disclose the set of comparable companies that the financial advisor used in its analysis for its Fairness Opinions because the Proxy did not also disclose that the financial advisor had used a different set of comparable companies four months earlier to conduct some initial preliminary analysis that was expressly subject to change. The Court of Chancery properly rejected this argument.

"In evaluating whether stockholders were fully informed, the Court must consider 'whether the Company's disclosures apprised stockholders of all *material* information and did not *materially* mislead them.'" *In re Match Grp., Inc. Deriv. Litig.*, 2022 WL 3970159, at *26 (Del. Ch. Sept. 1, 2022) (emphases added) (quoting *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018)). "At the pleading stage, that requires the Court to consider whether a plaintiff's complaint, when fairly read,

supports a rational inference that *material* facts were not disclosed or that the disclosed information was otherwise *materially* misleading." *Id.* (emphases added) (quoting *Morrison*, 191 A.3d at 282 (alterations adopted)). "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Morrison*, 191 A.3d at 282 (quotation omitted). "Framed differently, an omitted fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.* at 283 (quotation omitted).

Applying these principles here, the Court of Chancery correctly concluded that the change in Cowen's comparable companies analysis for TestEquity was immaterial as a matter of law. (*See* Op. Br., Ex. A. at 12:6–16:9.)

It is well-established that, "when the board relies on the advice of a financial advisor in making a decision that requires stockholder action, those stockholders are entitled to receive in the proxy statement a fair summary of the substantive work performed by the investment bankers." *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 900 (Del. Ch. 2016) (quotation omitted). "By definition," a fair summary "need not contain all information underlying the financial advisor's opinion or contained in its report to the board." *See id.* at 900–01. Nor must a "fair summary" include

information that, while contained in a preliminary draft analysis, was not used for the financial advisor's opinion or its ultimate report to the board. *See id.*. "The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions." *Id.* at 901; *see also Gantler v. Stephens*, 965 A.2d 695, 711 n.45 (Del. 2009) (fair summary standard does not require disclosure of "bends and turns in the road").

Appellant does not dispute that the Proxy satisfies the "fair summary" standard, which for decades "has been a guiding principle . . . in considering proxy disclosures concerning the work of financial advisors." *Trulia*, 129 A.3d at 900. Nor could Appellant so dispute when the Proxy discloses: the comparable companies Cowen ultimately used for its Fairness Opinions; that Cowen's analyses were "not purely mathematical, but instead involve[d] complex considerations and judgments concerning differences in historical and projected financial and operating characteristics of the Selected Companies and other factors"; and that Cowen concluded based on the comparable companies analysis as well as other metrics and analyses that DSG's consideration for the Mergers was fair. (A00286–88.)

Against these extensive disclosures, Appellant contends that the Proxy nonetheless was "materially deficient" because it did not disclose that Cowen supposedly "manipulated" its comparable companies analysis for TestEquity "at the

last minute" to match the EBITDA-multiple-based exchange ratio that had been negotiated" between the Special Committee and LKCM. (Op. Br. 3; *see also id.* at 23.) Appellant is incorrect on both the law and the facts as alleged in the Complaint and evidenced in the Section 220 production.

Appellant's nefarious characterization aside, all he has alleged is a change in the comparable companies that Cowen utilized as part of its evaluation of TestEquity between its preliminary presentations, in mid-August 2021, and its final presentations, in late December 2021. (*Compare* A00045–46, ¶ 69, *with* A00049–50, ¶ 77.) Critically, Appellant does not allege *any* facts to support an inference that the change reflects "manipulation" or anything else improper. Moreover, Appellant overlooks significant context indicating that the change in comparable companies reflects simply a refinement in Cowen's good-faith professional analysis.

Cowen's two sets of presentations used the following comparable companies for the three companies involved in the Mergers:

Company	August 11, 2021 and August 16, 2021[4] Presentations	December 24, 2021 and December 28, 2021 Presentations
TestEquity	(1) Avnet, Inc. (2) Rexel S.A. (3) WESCO International, Inc.	(1) Applied Industrial Technologies, Inc. (2) Fastenal Company (3) MSC Industrial Direct Co., Inc. (4) W.W. Grainger, Inc. (5) Watsco, Inc. (6) WESCO International, Inc.
Gexpro	(1) Applied Industrial Technologies, Inc. (2) DXP Enterprises, Inc. (3) Genuine Parts Company (4) Kaman Corporation (5) MSC Industrial Direct Co., Inc. (6) W.W. Grainger, Inc.	(1) Applied Industrial Technologies, Inc. (2) Fastenal Company (3) MSC Industrial Direct Co., Inc. (4) W.W. Grainger, Inc. (5) Watsco, Inc. (6) WESCO International, Inc.
DSG	(1) Applied Industrial Technologies, Inc. (2) DXP Enterprises, Inc. (3) Genuine Parts Company (4) Kaman Corporation (5) MSC Industrial Direct Co., Inc. (6) W.W. Grainger, Inc.	(1) Applied Industrial Technologies, Inc. (2) Fastenal Company (3) MSC Industrial Direct Co., Inc. (4) W.W. Grainger, Inc. (5) Watsco, Inc. (6) WESCO International, Inc.

[4] The presentation that Cowen gave to the Special Committee on August 17, 2021 is dated August 16, 2021. (*See* A00264.)

(*See* A01593, A01601, A01608 (August 11, 2021); A01643, A01651, A01658 (August 16, 2021); A01693, A01700, A01736, A01743 (December 28, 2021); B017, B024, B053, B060 (December 24, 2021.)

Between August and December, Cowen thus revised its selection of comparable companies not only for TestEquity, but also for Gexpro and DSG. Cowen's final sets of comparable companies included some from its initial set for TestEquity, others from its initial set for Gexpro and DSG, and others yet that were not part of either initial set. And Cowen did not present its final sets of comparable companies to the Special Committee "on the eve of the Merger Agreements" (Op. Br. 23), but rather at the previous meeting several days earlier, followed by discussion amongst the Special Committee (A00964; *see also* B01–72).

Appellant's attempt to distort Cowen's analyses further ignores the critical context that Cowen's August presentations were explicitly labeled, in red text at the bottom of every page: "PRELIMINARY DRAFT – SUBJECT TO FURTHER REVIEW AND REVISION." (A01577–1625; A01627–75.) Furthermore, while Appellant concedes that more than four months separated Cowen's August and December presentations, Appellant fails to account for the significance of that interval. For example, Cowen conducted active due diligence throughout those four-

plus months, in contrast to the relatively little due diligence Cowen had conducted by mid-August. (*See* A00261–73; A00940–56; A00960.)

Viewed in context, Appellant's allegations amount to a claim that certain details of Cowen's analyses underwent the kind of evolution one would reasonably expect from conducting extensive due diligence. It is hardly surprising that an experienced and reputable banker like Cowen would refine its perspective over the course of four-plus months of evaluation. Had Cowen's view *not* changed during all that time, *that* would have been truly surprising. Disclosure of such ordinary refinements, however, would "bury the shareholders in an avalanche of trivial information[—]a result that is hardly conducive to informed decisionmaking." *See Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974, at *4 (Del. Ch. Sept. 27, 1999) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976)), *aff'd*, 750 A.2d 1170 (Del. 2000).

Appellant's speculative theory that Cowen's changes were driven by the EBITDA-multiple negotiations between the Special Committee and LKCM, as opposed to Cowen's evolving professional judgment, does not lead to a different result. Appellant does not point to any factual allegations that support such a theory. In fact, Appellant did not even *allege* this theory. (*See* A00018–97.) In any event, the theory simply does not add up. As the Court of Chancery observed at oral

argument, "[i]t's not possible to carve out [the negotiation of the EBITDA multiples] from the rest of the negotiations." (Op. Br., Ex. A at 15:7–9.)

The Court of Chancery noted that although it may seem counterintuitive for the Special Committee to have negotiated a higher multiple to be used in valuing TestEquity "if you look at this one move in isolation" (*id.* at 15:9–10), the higher multiple came with the exclusion of the acquisitions then under consideration by TestEquity for purpose of estimating TestEquity's 2021 EBITDA to which the multiple would be applied (A00268–69). So, while the multiple went up, the underlying methodology changed in a manner that resulted in a lower estimate of TestEquity's 2021 EBITDA; even with the higher multiple, TestEquity's pro forma ownership valuation went down nearly 20%, from 18.9% to 15.8%. (*Id.*) Given that the Special Committee's negotiations around the EBITDA multiples ultimately *decreased* TestEquity's valuation, Appellant's theory that the multiples drove Cowen to "radically increase[] TestEquity's indicated value" is not reasonably conceivable. (*See* Op. Br. 22.)

Without factual allegations to support an inference that Cowen's change in comparable companies was improper, Appellant cites two cases for the proposition that "a financial advisor's dramatic changes in its analysis to justify an outcome present a material fact that requires disclosure." (Op. Br. 22.) But each case arose

on distinguishable facts that highlight Appellant's glaring failure to allege any facts that make it reasonable to infer Cowen manipulated its analyses to justify a pre-determined outcome.

Appellant relies primarily on *Clements v. Rogers*, 790 A.2d 1222 (Del. Ch. 2001). There, the trial court held that the complaint stated a disclosure claim by alleging that the proxy did not summarize an optimistic financial analysis provided just over a month before the banker's final, more pessimistic analysis, when the special committee had relied upon the earlier analysis to reject the counterparty's previous offer. *Id.* at 1243–44. The defendants argued that the earlier presentation did not require disclosure because it "contained preliminary analyses" and was not meant "to form the basis for a reliable valuation determination," but the Court found that position was not "backed up by unambiguous contemporaneous evidence," including the proxy's own description of the presentation. *Id.* at 1230, 1233, 1243–44. The Court also noted evidence that the changes were made to justify the directors' acquiescence to a counteroffer that otherwise seemed inadequate. *Id.* at 1243–44.

This case is different. Here, more than four months of due diligence separated the preliminary August presentations from the final December presentations and Fairness Opinions. The August presentations explicitly and unambiguously stated that their analyses were preliminary and subject to revision. Those presentations

occurred early in Cowen's evaluation of the targets at a time when significant additional due diligence had yet to be completed. And Appellant alleges no facts suggesting that the Special Committee relied on the preliminary analyses for its negotiations or that Cowen in fact changed them to justify a negotiated outcome. While Appellant argues that *Clements* should apply because "the [] discounted cash flow analyses [in that case] had yielded only a 20% difference in indicated values" (Op. Br. 24), Delaware courts have found such tell-me-more financial disclosures immaterial even when alleged changes to valuations would have resulted in far more significant differences. *See In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *3, *9–10 (Del. Ch. Oct. 16, 2013) (rejecting disclosure claim despite argument that changes to inputs would have resulted in valuation up to approximately 145% higher than final bid).

Appellant also relies on *In re Topps Co. Shareholders Litigation*, 926 A.2d 58 (Del. Ch. 2007). The plaintiffs there stated a disclosure claim by alleging that the proxy failed to disclose that a presentation delivered "a mere month or so" before the fairness opinion had used different inputs and assumptions and produced a higher target price. 926 A.2d at 74–77. In holding that the "major shifts in [the banker's] analytical approach" so late in the deal process were material, the Court noted evidence reflecting the changes were made "only after [the board's] attempts to

negotiate a [higher] price . . . had finally failed," in order to make the final offer "look more attractive." *Id.* at 76–77.

That is not the case here, either. The initial set of comparable companies that Cowen used were expressly preliminary and subject to further review and revision, and this preliminary analysis was done at a time when significant due diligence had yet to be completed. Indeed, Cowen's changes between the preliminary and final presentations occurred after four-plus months of additional due diligence. And again, the Complaint does not plead facts or identify any Section 220 materials suggesting that Cowen changed its analysis based on the parties' economic negotiations or had an improper purpose for making the changes.

At bottom, Appellant is wrong that the Proxy needed to disclose the "bends and turns in the road" leading to Cowen's final comparable companies analysis. *See Gantler*, 965 A.2d at 711 n.45 (quotation omitted and alteration adopted); *cf. In re BioClinica, Inc. S'holder Litig.*, 2013 WL 673736, at *6 (Del. Ch. Feb. 25, 2013) (holding that change in company projections that allegedly "dramatically impact[ed]" banker's comparable companies analysis did not state claim). And Appellant's "quibble with the substance" of Cowen's final analysis "does not constitute a disclosure claim." *In re JCC Hldg. Co.*, 843 A.2d 713, 721 (Del. Ch. 2003).

B. Disclosure of Rhodes' Alleged "Operating Partner" Role Was Immaterial.

1. Question Presented

Whether Appellant failed to allege adequately that the vote of the minority was not fully informed because the Proxy did not disclose that Rhodes allegedly was an "Operating Partner" of Headwater, when she was not on the Special Committee, had no role in the Special Committee process, and was one of five directors to vote at the Board level unanimously to follow the Special Committee's recommendation to approve the Mergers.

2. Scope of Review

This Court reviews *de novo* the application of *MFW* on a motion to dismiss. *Olenik*, 208 A.3d at 714.

3. Merits of Argument

Appellant's secondary argument is that the vote of the minority was not fully informed because the Proxy did not disclose that Rhodes was conflicted—as an alleged "Operating Partner" of Headwater—when she joined four other undisputedly independent and disinterested directors in unanimously voting to approve the Mergers at the Board level. Even assuming Rhodes was an "Operating Partner" at the time of the vote and that such role created a conflict of interest, however, Appellant has not alleged any facts suggesting that a reasonable stockholder would

have viewed a disclosure stating that Rhodes was an "Operating Partner" of Headwater as important in deciding how to vote under the circumstances.[5] Indeed, Appellant offers no allegations or argument to explain why Rhodes' alleged role made any difference at all in the transaction or its approval by stockholders.

First, Rhodes was not a member of the Special Committee and played no role in the Special Committee's thorough process. She did not appear at any one of the Special Committee's thirty-plus meetings to discuss the Mergers, and nothing in the Complaint or the Section 220 materials suggests that she had any involvement in the Mergers whatsoever before casting a vote at the Board level to approve the Mergers based on the Special Committee's recommendation. Her alleged conflict had nothing to do with any terms of the Mergers or the Special Committee's unanimous recommendation that the Board and stockholders vote to approve the Mergers.

Second, Rhodes' role at the Board level was limited to casting a cumulative fifth vote to approve the Mergers, after the deal process was complete and the Special

[5] As below, Independent DSG Defendants continue to reserve all rights to dispute that Rhodes is an "Operating Partner," that she had such role when casting a vote in favor of the Mergers, and that any such role (at any time) created a conflict of interest for purposes of her ability to impartially consider a demand or vote on the Mergers, including the right to seek permission to make a partial motion for summary judgment on demand futility following limited discovery on that issue. (*See* A01505 (citing *In re McDonald's Corp. S'holder Deriv. Litig.*, 2023 WL 2293575, at *33–35 (Del. Ch. Mar. 1, 2023)).)

Committee had unanimously recommended that the Board and stockholders approve the Mergers—a vote she cast alongside four other directors who were undisputedly independent and disinterested. (A00833.) As a result, even if Rhodes had not voted, the Mergers would still have been unanimously approved by the four other members of the Board who voted to follow the recommendation of the Special Committee.

Given that Rhodes' vote therefore made no difference in the approval of the Mergers—either at the Special Committee level or the Board level—a disclosure about her alleged "Operating Partner" role would not have "significantly altered the total mix of information made available" to stockholders considering how to vote. *See Morrison*, 191 A.3d at 283.

Without disputing that his own allegations demonstrate Rhodes' "Operating Partner" role was immaterial for a stockholder considering how to vote, Appellant argues that because Rhodes' alleged role as an "Operating Partner" was material *for purposes of demand futility* it was necessarily material *for purposes of a vote of minority stockholders*.[6] Appellant is incorrect. For purposes of demand futility,

[6] To be clear, the Court of Chancery merely found that, accepting the Complaint's allegations as true, Appellant had adequately alleged a reasonable doubt about Rhodes' independence, for demand futility purposes, arising from her alleged "Operating Partner" role. (*See* Oral Arg. Tr. at 84:22–85:1; *cf. Zuckerberg*, 262 A.3d at 1060 (discussing standard for pleading demand futility).) But Appellant has not

Rule 23.1's materiality standard relates to a director's own independence—*i.e.*, whether the director can impartially consider a demand. *See United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1061 (Del. 2021) (quotations omitted). But the materiality standard for a stockholder vote—whether a disclosure "significantly altered the total mix of information made available" to stockholders, *Morrison*, 191 A.3d at 283—relates to whether the stockholder has the information it needs to make an informed decision. Accordingly, it does not follow that information deemed material with respect to the narrow issue of demand futility is necessarily material information for purposes of a minority stockholder vote on the Mergers.

Rather, as the Court of Chancery recognized in one of Appellant's own cited cases, "[m]ateriality is a case-specific endeavor." *Kihm v. Mott*, 2021 WL 3883875, at *22 (Del. Ch. Aug. 31, 2021). Elaborating on this principle, *Kihm* explained:

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alleged any facts relating to the significance of Rhodes' alleged "Operating Partner" role, let alone facts suggesting that she owes fiduciary duties to or has an equity interest in Headwater. For that reason, the Court of Chancery properly rejected Appellant's effort to conflate Rhodes' alleged role with that of general partner. (*See* A01839.)

> As in all matters of public disclosure, materiality is the touchstone of the board's disclosure duty. This is true with respect to the disclosure of director conflicts. And not every fact tending remotely to suggest that a board member's interest might differ in some respect from that of the stockholders amounts to a material omission. Plaintiffs must allege facts from which the Court may reasonably infer that there is a substantial likelihood that a reasonable shareholder would consider the omission important in deciding how to vote.

Id. (quoting *In re OM Grp., Inc. S'holders Litig.*, 2016 WL 5929951, at *15 (Del. Ch. Oct. 12, 2016) (alterations adopted)), *aff'd*, 276 A.3d 462 (Del. 2022).

OM Group illustrates this principle, which wholly undermines Appellant's argument. There, the Court rejected the argument that a proxy's failure to disclose that the Chairman of the Board arguably had a conflict of interest due to executive roles with affiliates of the counterparty to the challenged merger was a material omission. *Id.* at *15–16. The Court explained that the "conclusory allegation" that the director had a "pre-existing relationship with [the] counterparty" did not make it "reasonably conceivable that this information should have been inserted in the Proxy or, if it was included, that it would have changed the total mix of information available to investors." *Id.* at *16. In so holding, the Court stressed that there was no allegation the director "exercise[d] undue influence over the other indisputably independent members of the . . . Board." *Id.*

Likewise, *Kihm* held that the alleged divergent liquidity interests between the chairperson of the board, based on his holdings in a private equity firm, and minority stockholders, were immaterial because the chairperson was not alleged "to have participated in the [a]cquisition process in any specific or remarkable way." 2021 WL 3883875, at *22. The Court noted that the complaint did not allege that the chairperson "contributed to any deficiency in the sales process" or "had any substantial role in negotiating the [a]cquisition." *Id.* "[A]bsent any allegation of bad acts, or even any act at all," the Court held that "further detail about [the chairperson's] allegedly bad intentions [was] immaterial." *Id.*

Against these cases, Appellant does not cite any authority for the proposition that potential conflicts for purposes of a director's independence at the demand futility phase necessarily are material when assessing whether minority stockholders were fully informed in deciding how to vote. Nor do any of Appellant's cases suggest that Rhodes' alleged "Operating Partner" role was material to minority stockholders in deciding how to vote on the Mergers here. To the contrary, each case underscores that potential conflicts are material *only* where the director in question played a significant role in the challenged transaction.

In half of Appellant's cases, courts found it material that directors harbored potential conflicts while serving as the chair of the special committee or otherwise

as the lead negotiator of the challenged transaction. *See Allen v. Harvey*, 2023 WL 7122641, at *6 (Del. Ch. Oct. 30, 2023) (holding that "[i]nformation pertaining to [director's] potential conflicts" was material "*given her role as the purportedly independent chair of the Transaction Committee*"); *Goldstein v. Denner*, 2022 WL 1671006, at *23 (Del. Ch. May 26, 2022) (holding that "a reasonable stockholder would want to know an important economic motivation *of the negotiator singularly employed by a board to obtain the best price for the stockholders*, when that motivation could rationally lead that negotiator to favor a deal at a less than optimal price." (citation omitted and emphasis added)); *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 21 (Del. Ch. 2014) (holding "that "special committee members' 'prior relationships' with a controller 'should have been disclosed' *because of the committee's 'role as negotiators on behalf of the minority stockholders*'" (citations omitted, alterations adopted, and emphasis added)).

In two other cases Appellant cites, courts found potential conflicts material where they were harbored by a majority of directors who had voted to approve the transaction. *See Feldman v. Cutaia*, 2006 WL 920420, at *8 (Del. Ch. Apr. 5, 2006) (holding that alleged conflicts by a group of eight directors and officers who collectively owned 89% of certain securities included in the challenged transaction were material to stockholders); *Eisenberg v. Chi. Milwaukee Corp.*, 537 A.2d 1051,

1061 (Del. Ch. 1987) (holding that stockholders "were entitled to know" that a full "half of [the] Board of Directors" had potential conflicts of interest).

Appellant's final case is simply inapposite. *See Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 18 (Del. Ch. 2002) (holding in context of challenge to vote for electing purportedly independent directors that stockholders "would have wanted to know" about the directors' alleged potential conflicts of interests "in deciding how to vote on [their] elections").

This case is much different than the cases Appellant cites. Here, Appellant does not allege that Rhodes served on the Special Committee, attended any of its thirty-plus meetings, or had *any* role in negotiating, reviewing, or influencing the Special Committee's consideration of the Mergers. (*See* A00936–64.) Appellant has conceded that Rhodes did not receive any unique benefit as a result of the Mergers. (A01822.) Appellant alleges Rhodes' sole involvement and influence was limited to casting a fifth vote to approve the Mergers at the Board level—alongside four other directors—after the Special Committee had unanimously approved, and recommended that the Board and stockholders approve, the Mergers.

In addition, Appellant does not allege that any director *other than Rhodes* who voted on the Mergers had any undisclosed conflicts. Appellant thus tacitly concedes that the other four directors who voted to approve the Mergers were independent and

disinterested, such that the Board-level vote would have been 4-0 in favor of the Mergers even if Rhodes had abstained. Under these circumstances, nothing in the law or logic supports Appellant's theory that stockholders would have found Rhodes' alleged conflict significant in deciding how to vote.

Accordingly, "absent any allegation of bad acts, or even any act at all," on the part of Rhodes, disclosure of her alleged "Operating Partner" role was immaterial to minority stockholders as a matter of law. *See Kihm*, 2021 WL 3883875, at *22.

III. THE BUSINESS JUDGMENT RULE FORECLOSES APPELLANT'S CLAIMS BECAUSE A SPECIAL COMMITTEE OF INDEPENDENT AND DISINTERESTED DIRECTORS APPROVED THE MERGERS.

1. Question Presented

Whether the business judgment rule applies to foreclose Appellant's claims, regardless of whether the vote of the minority was fully informed, because the transaction (which was not a controller squeeze-out) was approved by a Special Committee comprised of undisputedly independent and disinterested directors.

2. Scope of Review

This Court reviews *de novo* questions of law, such as whether the business judgment rule or the entire fairness standard applies. *Reddy v. MBKS Co.*, 945 A.2d 1080, 1085 (Del. 2008).

That issue was recently raised for the first time on appeal in another action pending in this Court. *See* May 30, 2023 Order, *In re Match Grp., Inc. Deriv. Litig.*, No. 368, 2022, ¶ 3 & n.3 (Del.) (ordering supplemental briefing on this issue). A decision on that issue in *Match* may be dispositive here. Thus, as in *Match*, this Court may "consider and determine" this issue on appeal because "the interests of justice so require." Sup. Ct. R. 8; *see also Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1275 (Del. 2014); *Reddy*, 945 A.2d at 1086.

3. Merits of Argument

This Court should hold that the business judgment applies without regard to whether the vote of the minority was fully informed because the Mergers were approved by an indisputably independent and disinterested Special Committee.

In *Match*, the Court currently is considering whether either of the twin *MFW* protections—approval by a special committee of independent directors *or* by the majority of minority stockholders—suffices to obtain the business judgment rule. As the appellees argued in *Match*, bedrock principles of Delaware law recognize that either *MFW* protection *alone* suffices to invoke the business judgment standard in conflicted transactions, including those involving controlling stockholders so long as the transaction is not a controller squeeze-out. *See* Lawrence A. Hamermesh et al., Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead, 77 BUS. LAW. 321, 333 (2022).

As the Court of Chancery explained in *Citron v. E.I. Du Pont de Nemours & Co.*, for instance, just as approval by independent and disinterested directors permits invocation of the business judgment rule under 8 *Del. C.* § 144(a)(1), Delaware courts "have applied the same analysis, and reached similar results, in interested transactions that were not decided under § 144" except in the case of parent-subsidiary mergers and other controller squeeze-outs. 584 A.2d 490, 500–01 & n.14

(Del. Ch. 1990) (collecting cases). It was against that backdrop that *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110 (Del. 1994), adopted a more stringent standard for controller squeeze-outs given the unique threat posed by a controller's ability to make a tender offer and bypass the board of directors in that context. *Id.* at 1115–20. This Court's *MFW* framework arose in the same context, as this Court has repeatedly underscored. *See, e.g.*, *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 706-07 & nn.170, 174 (Del. 2023) (discussing *Lynch*, *MFW*, and others as developed "in the context of controller squeeze-outs").

In this case, Appellant has never disputed—and does not dispute here—that the Special Committee consisted of three independent and disinterested directors. While Appellant previously asserted that the Special Committee was not fully empowered or did not discharge its duty of care in negotiating a fair deal, Appellant's opening brief does not challenge the Court of Chancery's holding that the Special Committee "carried out . . . the larger transaction as a whole . . . under the *MFW* framework." (Op. Br., Ex. A at 15:17–19; *see also* A00163–67, A01525–26 (explaining why the Special Committee discharged its duty of care).) Appellant therefore cannot raise that contention as a basis to reverse the decision below. *See Emerald P'rs*, 726 A.2d at 1224.

CONCLUSION

Following nearly two years of abandoned and shrinking legal theories across two trial court proceedings, including several now-discarded disclosure theories and other claims, Appellant offers no basis to support a reasonable inference that DSG failed to disclose any material information or otherwise failed to satisfy *MFW*. The Court of Chancery properly applied the business judgment rule and dismissed the Complaint with prejudice. For all the foregoing reasons, Appellees respectfully request that this Court affirm the final judgment order.

Dated: January 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 22, 2024, I caused true and correct copies of *[Public Version] Appellees' Joint Answering Brief* to be served by File & Serve*Xpress* on the following counsel of record:

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